83-191

No.

IN THE

Supreme Court of the United States

October Term, 1983

TERRENCE KUBIAK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

I. Whether the initial custodial detention of an individual by federal agents constitutes an "arrest" for purposes of 18 U.S.C. § 3161(b) which requires the filing of an indictment within thirty days of arrest.

LIST OF PARTIES IN COURT OF APPEALS

Appellants

Theodore Burton
Terrence Kubiak (Petitioner)
David Parks

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, No. 81-6007, entered in the above-entitled case on July 13, 1983.

OPINION BELOW

The opinion of the Court of Appeals, sub. nom. *United States v. Kubiak* is as yet unpublished; however, an advance copy published by West Publishing Company is reprinted in Appendix A.

JURISDICTION

The judgment of conviction of the United States District Court for the Middle District of Florida was affirmed by judgment of the United States Court of Appeals for the Eleventh Circuit dated May 20, 1983, and entered July 13, 1983. A Petition for Rehearing on behalf of a co-defendant, David Parks, was denied by the Court of Appeals on August 3, 1983. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

This case involves 18 U.S.C. §§3161 and 3162, reprinted in Appendix C to this petition.

STATEMENT OF THE CASE

References to the Record will be designated as (R-), to the transcript of preliminary hearings as (TP-) and to the trial transcript as (T-).

Petitioner was convicted of violations of 21 U.S.C. §841(a)(1) and 21 U.S.C. §955c. The United States District Court for the Middle District of Florida had jurisdiction of this case.

At about 3:38 p.m. on February 5, 1981, Terrence Kubiak and a companion, Theodore Burton, while aboard the Shannon Brown II, were stopped by Coast Guard officials responding to an anonymous caller reporting a "pot transaction" allegedly occurring several miles offshore of the Ponce Inlet. The Coast Guard terminated the Shannon Brown II's voyage for lack of proper safety devices and escorted the vessel to the Coast Guard station on shore in New Smyrna Beach. A warrantless search of the Shannon Brown II was conducted by Coast Guard officials absent

consent of Kubiak or Burton. As a result of the search, Kubiak and Burton were arrested by the United States Coast Guard at 6:10 p.m. for violation of federal laws against smuggling marijuana into the United States. (TP-318). Defendants were advised of their rights and frisked by a Coast Guard official. Subsequently, officers from the United States Customs Department arrived on the scene and re-arrested defendants. (T-414). Defendants were thereafter placed in the custody of New Smyrna Beach police officers who re-arrested, handcuffed and transported them to the County Jail that evening. (TP-392). Petitioner was charged by information with violation of State laws against trafficking marijuana. (TP-449).

At the direction of the United States Attorney's office state prosecution was initiated against defendants. (TP-425). Defendants began preparing their defense by subpoenaing several witnesses for deposition. On April 23, 1981, while the first of the depositions was in progress, defendants received notice that the charges against them had been nolle prossed by the state. (TP-450). Apparently state prosecutors realized they faced a jurisdiction problem and requested federal prosecution of the case. (TP-456).

Shortly thereafter defendants learned they were the subject of a federal grand jury investigation. (TP-406). On June 10, 1981, a grand jury indictment was issued charging defendants with violation of federal laws against smuggling marijuana into the United States. (TP-496). Defendants voluntarily surrendered at the federal courthouse and were released on bond.

Motions to Dismiss and Suppress were filed on behalf of defendants and subsequently denied by the United States

District Court. On August 20, 1981 defendants were tried before the United States District Court for the Middle District of Florida and subsequently convicted. An appeal was filed on behalf of Petitioner on October 1, 1981, asserting that Petitioner's motion to dismiss had been improperly denied by the District Court. The United States Court of Appeals for the Eleventh Circuit affirmed Petitioner's conviction on May 20, 1983. No petition for rehearing was filed on behalf of Appellant. A petition for rehearing on behalf of a co-defendant, David Parks, remains pending before the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. THE SPEEDY TRIAL ACT, 18 U.S.C. §3161, ET. SEQ. IS TRIGGERED BY FEDERAL ARREST, REGARDLESS OF WHETHER FORMAL CHARGES ARE BROUGHT SUBSEQUENT TO ARREST.

The issue presented in this case is one of statutory interpretation of Title I of the Speedy Trial Act of 1974, 18 U.S.C. §3161, *et seq.*, (hereinafter referred to as "the Act") which is reprinted in full in Appendix C. It is unclear whether the Act is triggered by the initial arrest, or whether the trigger mechanism is the filing of a formal charge following arrest. Consequently, the law is developing unevenly and ambiguously. It is imperative for the Court to exercise its supervision in this area in order to assure consistent application of the law.

The Court of Appeals held that the sanction provision of the Act, §3162(a)(1), did not apply to an individual who had not been formally charged with an offense following arrest, agreeing with the Government's contention that "arrest" in the Act refers to that point at which a defendant is first *charged* with a crime. They held, in effect, that

the defendant had not been "arrested" within the meaning of the Act when the defendant's sea voyage was terminated and he was taken into custody.

On the contrary, the Act's legislative history reveals no such intent. The Committee on the Judiciary of the U.S. House of Representatives, 96th Congress, 1st session, in its report on the Speedy Trial Amendments Act of 1979 (Report #9b-390), stated (on page 3, paragraph 1):

> The Act provides that, after July 1st, 1979, accused persons must be indicted within 30 days of arrest, arraigned within 10 days of indictment, and tried within 60 days of arraignment. *Failure to meet the time line of 30 days from arrest to indictment calls for a dismissal of the charges . . .* (Reprinted in pertinent part, Appendix E) (Emphasis added)

The Eighth Court of Appeals has recognized the "gap in . . . [the] . . . remedial provisions" of 18 U.S.C. §3162(a)(1) when applied to those cases in which only an arrest has occurred and no charges have been filed. *United States v. Solomon,* 679 F.2d 1246 (8th Cir. 1982). Legal scholars have been critical. *See* Frase, *The Speedy Trial Act of 1974,* 43 U.Chi.L.Rev. 667 (1976), where the author observes, "there are major difficulties in defining excludable time periods, interim provisions and allowable sanctions." *id.*, at 676.

The Speedy Trial Act of 1974 was instituted with a two-part objective. First, it sought to reduce crime and the danger of recidivism; second, it aimed at giving real meaning to the sixth amendment speedy trial protection by establishing time limits within which an accused must be brought to trial. *See,* A. Partridge, *1974 House Committee Report: Legislative History of Title I of the Speedy*

Trial Act of 1974 (Fed. Judicial Center 1980).

It is apparent that the Act and the sixth amendment have consistent goals, *i.e.*, to protect accused individuals from lengthy, unnecessary prosecutorial delays. Therefore, the action triggering speedy trial protection under the sixth amendment, namely arrest, should be no less significant merely because a defendant is proceeding under a *statutory* right rather than a *constitutional* right.

There is a clear conflict between this Court's definition of "arrest" under the sixth amendment and the Court of Appeal's definition of "arrest" under the Act in the instant case. In sixth amendment cases, this Court has held that physical confinement constitutes an arrest. *See United States v. Marion*, 404 U.S. 307 (1971), *Dillingham v. United States*, 423 U.S. 65 (1975), and *United States v. Avalos*, 541 F.2d 1100 (5th Cir. 1976). The Court of Appeals in the instant case requires physical confinement *plus* the filing of charges against the accused. This conflict requires attention by this Court to resolve a seemingly inconsistent development in the law. There should be no distinction in the definition of "arrest" for statutory as opposed to constitutional purposes.

Additionally, there is an apparent confict between the Court of Appeals holding in *Kubiak* and *United States v. LaCruz*, 441 F.Supp. 1261 (S.D.N.Y. 1977), affirmed without opinion at 676 F.2d 688 (3rd Cir. 1982).

In *LaCruz*, the defendant was indicted six months after his arrest by federal agents. In the interim, the case had been recommended for state prosecution, turned down, and inadvertently misplaced. The District Court held that the prosecutor's delay was not an "excusable" one under 18 U.S.C. §3161(h), and, therefore, dismissed defendant's indictment with prejudice.

There was similar prosecutorial inadvertence in *Kubiak*. The record reflects that state prosecutors should have realized their jurisdiction problems in ample time to forward the case to federal prosecutors and assure compliance with 18 U.S.C. §3161(b). However, state prosecutors maintained their pretrial investigation for two months under the more liberal state discovery rules while prosecuting a case over which the state clearly had no jurisdiction. The record amply demonstrates that the arrest was beyond the State's territorial jurisdiction and that *federal* prosecution was the only option open to the arresting agents.

CONCLUSION

As the courts below are in need of a clearly articulated standard to apply to such cases in order to determine what is an arrest for purposes of the Speedy Trial Act, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Terrence A. KUBIAK, David Parks,
Theodore Burton, IV,
Defendants-Appellants.

No. 81-6007

United States Court of Appeals,
Eleventh Circuit.

May 20, 1983.

Appeals from the United States District Court for the Middle District of Florida.

Before FAY and VANCE, Circuit Judges, and ALLGOOD,* District Judge.

PER CURIAM:

Defendants were convicted in the United States District Court for the Middle District of Florida, John A. Reed, Jr., J., of conspiracy to possess with intent to distribute marijuana, and possession with intent to distribute marijuana, and they appealed. The Court of Appeals held that: (1) Coast Guard's initial stop and boarding of vessel was constitutional; (2) motions of defendants to dismiss indict-

*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

ments for Speedy Trial Act violations were properly denied; (3) evidence was sufficient to support defendant's conviction on conspiracy counts; and (4) failure of prosecution to provide defendant, in timely manner, with an exculpatory statement made by a jointly indicted co-conspirator did not violate *Brady*.

Affirmed.

1. Shipping – 9

Where vessel was stopped five or six miles from Florida coastline, it was in customs waters and subject to operation of federal law, which gives Coast Guard plenary power to stop and board any American vessel anywhere on high seas in complete absence of suspicion of criminal activity; therefore, initial stops and boarding of vessel was not unconstitutional. U.S.C.A. Const.Amend. 4; 14 U.S.CA. – 89(a).

2. Criminal Law – 577.16(1)

Defendants were initially arrested by federal authorities, but were never taken before federal magistrate, nor were federal charges ever lodged against them in a complaint; rather, defendants were charged by an information filed in state circuit court, and then federal prosecuting authorities were encouraged to take over prosecution of offense; therefore, motions of defendants to dismiss indictment for Speedy Trial Act violations were properly denied. 18 U.S.C.A. §§ 3161 et seq., 3162(a)(1).

3. Conspiracy – 47(12)

Evidence was sufficient to support defendant's conviction of conspiracy to possess with intent to distribute marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

4. Criminal Law – 627.8(2)

Failure of prosecution to provide defendant in timely manner, with an exculpatory statement made by a jointly indicted co-conspirator did not violate rule announced in United States Supreme Court decision providing that prosecution may not suppress evidence requested by defendant which is favorable to defendant and material to his guilt or punishment; statement of defendant's co-conspirator was discovered and presented at trial, and consequently, defendant's claim involved mere delay in transmittal of information or materials to defense and not outright omission that remained undiscovered until after trial.

5. Criminal Law – 627.8(6)

Failure of prosecution to provide defense with copy of relevant lab report prior to trial did not compel trial court to strike testimony of Government chemist; defense never asked for recess or continuance or for inspection or testing of contraband, and therefore made no showing of prejudice but merely asserted that Government's untimely disclosure denied defendant right to effectively challenge report or pursue further discovery concerning evidence or Government witness. Fed.RulesCr.Proc.Rule 16(d)(2), 18 U.S.C.A.

6. Criminal Law – 404(4)

Sample of marijuana taken by Government witness from boat used in criminal activity was not improperly admitted into evidence; question of whether Government failed to introduce evidence connecting marijuana to defendant, or failed to establish chain of custody of marijuana sample affected not admissibility, but only weight of such evidence.

Appeals from the United States District Court
for the Middle District of Florida

Before FAY and VANCE, Circuit Judges, and ALL-GOOD*, District Judge.

PER CURIAM:

Appellants Terence Kubiak, Theodore Burton, and David Parks were found guilty of conspiracy to possess with intent to distribute marijuana and possession with the intent to distribute marijuana, in violation of 21 U.S.C. Sections 841(a)(1) and 955c.[1] The three men were tried together in the district court, and each has appealed. Upon review, we affirm each conviction.

BACKGROUND

At approximately 3:00 p.m. on February 5, 1981, a communications employee of the United States Coast Guard received an anonymous phone call from a man who stated that a large transfer of marijuana was to take place off the Ponce de Leon Inlet in the Atlantic Ocean. No other information was given. The information was relayed immediately to Chief Boatswain Mate David Creed of the Coast Guard. Chief Creed promptly ordered a boat crew to check the area in the Atlantic Ocean east of the Inlet and to remain in radio contact with the Coast Guard station.

*Honorable Clarence W. Algood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

[1]Appellant Parks was found guilty only of conspiracy to possess with the intent to distribute marijuana. A motion for a directed verdict of acquittal on behalf of appellant Parks was granted as to the substantive possession charge.

The crew left the station in a 40-foot Coast Guard vessel under the command of Randy Miller, Boatswain Mate Second Class. The Coast Guard vessel encountered a 31-foot Chris Craft Sport Fisherman named the Shannon Brown II about five to six miles east of the shoreline of New Smyrna Beach. When first sighted by the Coast Guard, the Shannon Brown was lying dead in the water, and no other boats were in the immediate vicinity. As the Coast Guard vessel came within one-half mile of the Shannon Brown, her engines started and she moved at a high rate of speed on a northeasterly course away from the approaching Coast Guard vessel. The Shannon Brown continued on this for a minute or two and then turned toward the Coast Guard vessel and proceeded at a slow rate of speed. At this point Randy Miller radioed the Shannon Brown and stated his intention to board the boat and conduct a documents and safety inspection.

As the two vessels neared, Randy Miller noticed that the bow of the Shannon Brown was riding low in the water and that the registration numbers displayed on her bow indicated that the boat was registered in Delaware whereas the port of call painted on the transom was New Smyrna Beach.

Randy Miller sent a two-man boarding party to the Shannon Brown. The boarding party found two people on board the vessel – appellants Burton and Kubiak. The boarding party was advised that the cabin was locked and neither occupant had a key. No registration papers were produced and the boarding party noticed that there were no floatation devices visible above decks. They also noticed that the doors to the cabin of the boat were locked, all port holes were covered with a tinting material and draped, and the window in the door of the cabin was tinted but not draped.

The Shannon Brown was escorted back to the Coast Guard station at Ponce Inlet for the purpose of finishing the safety and document search that was commenced on the high seas, but frustrated by the boarding party's inability to enter the cabin.

When the Shannon Brown approached the dock at the Coast Guard station, the Coast Guard's dock crew noticed that the boat was riding low in the water. After the Shannon Brown docked, appellant Burton was asked if the boat was taking on water. He responded that she was taking on a lot of water. The dock crew was concerned that the Shannon Brown might sink at dock side.

Several members of the dock crew looked through the tinted window of the vessel's cabin door and saw what appeared to be bales of marijuana. They also smelled marijuana. The Coast Guard broke the cabin door open and discovered square packages wrapped in burlap and plastic, containing marijuana.

The Coast Guard placed appellants Burton and Kubiak under arrest and then contacted numerous federal, state, and local law enforcement agencies; thereafter, law enforcement officers arrived from the New Smyrna Beach Police Department, the U.S. Customs Service, the Volusia County Narcotics Task force, and the federal Drug Enforcement Administration.

Federal authorities declined federal prosecution in favor of state prosecution, even though the initial arrest was made by the U.S. Coast Guard. Consequently, after appellants Burton and Kubiak were arrested by the Coast Guard, they were rearrested on February 5, 1981, by Florida state and local law enforcement officers. The appellants were charged by an information filed in the Florida Circuit Court for the Seventh Judicial Circuit.

The state prosecuting authorities became concerned that the state court might lack jurisdiction over the appellants because the Shannon Brown was apprehended beyond the three-mile limit. Federal prosecuting authorities were encouraged to take over the prosecution of the offense. On April 9, 1981, a federal grand jury investigation was commenced, and on June 10,1981, an indictment was returned against appellants Burton, Kubiak, and several other persons for violation of the federal laws relating to controlled substances. Appellants Burton and Kubiak voluntarily surrendered themselves to the United States Attorney for the Middle District of Florida. No federal complaint was ever filed, nor was any federal arrest warrant obtained for the arrest of Burton or Kubiak.

Appellants Burton and Kubiak

[1] On appeal appellants Burton and Kubiak argue that the district court committed reversible error in denying their motions to suppress the physical evidence seized from the Shannon Brown, since the initial stop and boarding of the vessel was unconstitutional. We find this argument unavailing. The Shannon Brown as stopped five or six miles from the Florida coastline. She was therefore in customs waters and subject to the operation of federal law. Where a vessel is subject to the operation of federal law, Section 89(a), 14 U.S.C. Section 89(a) (1976), "gives the Coast Guard plenary power to stop and board [the vessel or] any American Flag vessel anywhere on the high seas in the complete absence of suspicion of criminal activity."[2] *United States v. Williams*, 617 F.2d 1063, 1075

[2]Section 89(a) provides the following:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and water over which the United States has jurisdic-

1075 (5th Cir.1980) (en banc); *United States v. Warren*, 578 F.2d 1058, 1064 (5th Cir. 1979) (en banc). Once boarded it was readily apparent that the vessel was in noncompliance as to the proper documents and safety equipment. The observations made thereafter provided an ample basis for the action taken by the Coast Guard.

[2] Appellants Burton and Kubiak also contend that the trial court committed reversible error in denying their motions to dismiss the indictment for an alleged violation of the Speedy Trial Act of 1974, 18 U.S.C. Sections 3161, *et seq.*, (1976) (the "Act"). The appellants sought a dismissal of the indictment with prejudice pursuant to Section 3162(a)(1), which reads as follows:

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tion, for the prevention, detection and suppression of violations of laws of the United States.

For such purposes, commissioned, warrant and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested . . . . or other lawful and appropriate action shall be taken; or if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board, . . . such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty, such vessel or such merchandise, or both shall be siezed.

This statute has been held constitutional. *Williams*, at 1075.

> (a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) . . . such charge against that individual contained in such complaint shall be dismissed or otherwise dropped . . .

In *United States v. Sayers*, 698 F.2d 1128 (11th Cir.1983), a panel of this court recently observed that "[t]his provision establishes that Congress intended the provisions of the Act to apply only if an individual was formally charged with an offense." At 1131. The record in this case reveals that although the appellants were initially arrested by federal authorities, they were never taken before a federal magistrate; nor were federal charges ever lodged against the appellants in a complaint.[3] For this reason, the

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[3]In fact, the federal law enforcement authorities declined prosecution in favor of the state law enforcement agency. Only after jurisdictional problems arose in the state prosecution did the federal authorities become involved in the investigation. Federal involvement culminated in the return of a federal indictment. Consequently, appellants Burton and Kubiak were not held to answer in federal court until they were indicted.

We briefly note that in *Sayers* the government admitted that the defendant was seized, temporarily taken into custody, photographed and fingerprinted before being released. And, the defendant in that case believed himself to be under arrest at that time. Nevertheless, the court agreed with the government's contention that " 'arrest' in the Speedy Trial Act refers to that point at which a defendant is first charged with a crime. Since no complaint or formal charge was issued against [the defendfant on the date of his original arrest] . . . he was not 'arrested' within the meaning of that Act." At 1130.

motions of appellants to dismiss the indictment for Speedy Trial Act violations were properly denied by the trial court.[4]

We affirm the convictions of appellants Burton and Kubiak.

Appellant Parks

[3] Appellant Parks initially contends that the evidence was insufficient to support his conviction on the conspiracy count. The applicable standard of review for a sufficiency challenge recently was enunciated in *United States v. Bell*, 678 F.2d 547 (5th Cir. Unit B) (en banc), *cert. granted*, ____ U.S. ____, 103 S.Ct. 444, 74 L.Ed.2d 600 (1982);

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

678 F.2d at 549 (footnote omitted). Viewing the evidence presented in this case and the inferences that may be drawn from it in the light most favorable to the government, *see, e.g., Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), we conclude that a reasonable jury could find appellant Parks guilty of the conspiracy count.

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[4] Applying the test set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), we hold that the delay between the appellants' arrest and their indictment also does not violate their constitutional right to a speedy trial.

On February 5 in the early morning hours, Parks was observed at the Riverside Marina with Burton, Brown, Walker, Kubiak and a number of other people. He left the marina in a 262 Chris Craft. At least two other boats left at the same time. Several hours later Parks returned to the marina in the same boat, refueled and left. As he was departing, Parks told several marina employees that Burton was having trouble out in the ocean and he was returning to assist him. Parks were observed returning again to the marina in the late afternoon in the same 262 Chris Craft. Observers described the boat as then riding "bow heaving." The next morning employees of the marina noticed the 262 Chris Craft was missing. A day or so later Parks ordered two employees to where it was located. These men found the boat sitting on the bottom in 3 or 4 feet of water with marijuana residue floating in it. They pumped it out and returned it to Riveside Marina. One of these men, Stires, gathered up some marijuana residue from the boat and took it home. Stires testified that he later gave the same marijuana to a DEA agent. Stires also testified that Parks had told him that he (Parks) was to receive $25,000 for his part in the deal. Such evidence is sufficient to sustain Parks' conviction.

[4] Appellant Parks also contends that his conviction should be reversed because certain exculpatory evidence was withheld from him by the prosecution. Relying on *Brady v. Maryland,*[5] 373 U.S. 83, 83 S.Ct. 1194, 10

[5]The *Brady* doctrine holds that "suppression . . . of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196. In *United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Supreme Court discussed three situations in which *Brady* violations may occur in a given case. In the first, the prosecution knows or should know that the undisclosed informa-

L.Ed.2d 215 (1963), the appellant maintains that due process was violated by the prosecution's failure to provide him, in a timely manner, an exculpatory statement made by a jointly-indicted co-conspirator.

Although we find the untimely disclosure troubling, we have concluded that the rule of *Brady v. Maryland* was not violated by the prosecution's failure to provide the defense with the co-conspirator's statement in a timely manner. We first note that "the circumstances at the trial below did not resemble the typical situation giving rise to a *Brady* claim. As the Supreme Court observed in *United States v. Agurs,* the context in which *Brady* claims are generally raised 'involves the discovery, *after* trial, of information which had been known t the prosecution but unknown to the defense.' 427 U.S. at 103, 96 S.Ct. at 2397." *United States v. Kopituk,* 690 F.2d 1289, 1339 (11th Cir.1982). In this case, the record reveals that the statement of the appellant's co-conspirator was discovered and presented at trial. Consequently, appellant Parks' *Brady* claim involves mere delay in the transmittal of information or materials to the defense and not outright omission that remained undiscovered until after trial.

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tion indicates that the prosecution's case will include perjured testimony. In the second, the defense specifically requests the disclosure of evidence that was withheld. In the third, no request or only a general request for all exculpatory material is made, and certain exculpatory material is not tendered. 96 S.Ct. at 2397-99. In *Garrison v. Maggio,* 540 F.2d 1271 (5th Cir.1976), *cert. denied,* 431 U.S. 940, 97 S.Ct. 2655, 53 L.Ed.2d 258 (1977), as we stated in *United States v. Anderson,* 574 F.2d 1347, 1353 (5th Cir.1978), this court "defined a fourth type of situation in which the *Brady* doctrine applies: the prosecutor fails to disclose purely impeaching evidence not concerning a substantive issue, in the absence of a specific defense request." Varying degrees of materiality are assigned depending upon the context of the alleged violation.

"In considering whether the government's nondisclosure of exculpatory information operated to deny a federal defendant his right to due process of law guaranteed by the [f]ifth [a]mendment, the focus is not upon the fact of nondisclosure, but upon the impact of the nondisclosure on the jury's verdit." *Kopituk*, at 1339. "As was stated in *United States v. Agurs, supra*, no denial of due process occurs 'unless the omission deprived the defendant of a fair trial . . . .' " *Id.*, at 1340, *citing*, 427 U.S. at 108, 96 S.Ct. at 2399. In the instant case, any possible prejudice resulting from the untimely disclosure could have been easily cured during trial.

Prior to trial, the prosecution properly informed the defense that it had taken the statement of co-conspirator Steve Brown and that the statement contained evidence favorable to the defense. The defense took no action to obtain the evidence. Although during trial the defense expressed general concern over the government's failure to supply *Brady* materials, it never moved the trial to compel the government to turn over the co-conspirator's statement. Indeed, the defense took no affirmative steps to secure the information, even though co-conspirator Brown was present in the courtroom on the first day of trial. On the third day of trial, in an effort to insure that appellant Parks had the benefit of any materials which could conceivably aid him in his defense, the trial court, *sua sponte*, ordered the government to turn over the co-conspirator's statement. After receiving the information, the defense simply renewed its request for a mistrial. This request was denied.

Claiming that the trial court erred in denying its motion for a mistrial, the appellant now argues that the belated discovery prejudiced the preparation of his case; the appellant maintained that had he known of Steve

Brown's statement he could have fully exploited its exculpatory possibilities. The evidence of record clearly indicates that the defense knew before trial and was reminded during trial that the government had in its possession evidence favorable to the defense. Not once did the defense make a meaningful attempt to obtain this information. Even after receiving the co-conspirator's statement on the third day of trial the defense did not move for a continuance or request a recess. Further, the defense never introduced co-conspirator's Brown's statement into evidence, nor did it attempt to call Steve Brown as a witness. These failures undercut any arguments of prejudice the appellant attempts to make at this time. *Gorham v. Wainwright,* 588 F.2d 178, 180 (5th Cir.1979).

The difficulty with appellant Parks' *Brady* claim can be seen from another perspective. *Brady* is implicated only when the evidence withheld is "material."[6] It is noteworthy

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[6]The trial transcript provides in relevant part:

> MR. GARLOVSKY [defense counsel]: Well, I feel we're entitled – this is again my problem on the discovery. I feel Mr. Brown's statement, which looked like it was about a hundred or 200 pages, may contain Brady material.
>
> MR. URBANIAK [government's counsel]: It does contain some Brady material in small respects that I have informed Mr. Garlovsky of, that I'll pick out the pieces. I told him what is Brady in that, just as I told him about Mr. Stiers' statement. Mr. Stiers may or may not have an explanation for not telling the Grand Jury.
>
> I sent a letter out where I said you might want to look at this. This witness a couple times appeared before the Grand Jury and didn't tell everything he knew the first time and later turned the evidence in. So, be aware of it. There is some Brady material in Mr. Brown's statements.
>
> MR. URBANIAK: Yes, sir. He has previously been informed, Judge, for the record, and he can disagree with it, that there was certain Brady material. And, I have informed what it was, as to whether – at whose instance the

in this connection that the appellant's basic argument is that the belated discovery hampered his trial preparation and affected his trial strategy. But the Supreme Court has specifically rejected the proposition that the applicable standard of materiality should focus on the defendant's ability to prepare for trial. *United States v. Agurs*, 427 U.S. at 112 n. 20, 96 S.Ct. 2392, 2402, 49 L.Ed.2d 342. Rather, the inquiry is whether presentation of the evidence would create a "reasonable doubt of guilt that would not otherwise exist."[7] *Id.* at 112, 96 S.Ct. at 2402.

The government offered as circumstantial evidence against the accused his statement to a government witness that the witness may find himself shot if he talked. In its closing argument, the prosecution argued that the appellant's threatening of a government witness indicated a consciousness of guilt. On appeal, the appellant maintains that Steve Brown's statement would have refuted the government's assertion that he was attempting to protect himself by making threatening statements to a government witness; the appellant further argues that the statement would have shown that he was merely expresing his own fears to the witness when he uttered the threatening-like

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boats were taken from the marina. Now, I have told him that.

MR. GARLOVSKY: I don't think he told me,. your Honor, that this was Steve Brown's Brady material. He has never sent me a letter to that effect or gave me any specific statements that Brown gave a two-hundred-page statement.

(R.Vol. 15 of 16, pp. 567-569).

[7]The *Brady* mandate "commands the disclosure of *exculpatory* evidence, a requirement that invites review of the record for materiality." *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir.1978). Indeed, "[t]he judicial emphasis consistently has been placed on the determination of materiality." *United States v. Anderson*, 574 F.2d 1347, 1353 (5th Cir.1978); *United States v. Mesa*, 660 F.2d 1070, 1076 (5th Cir. Unit B 1981).

statement.[8] Viewing the record as a whole, we are unconvinced that co-conspirator Brown's statement, if timely disclosed and admitted into evidence, would have altered the jury's verdict.[9]

On cross-examination, a government witness testified that he had overheard the appellant talking to Steve Brown, that the appellant told Brown that he should be careful of what he says or else he could end up shot. The witness specifically testified that he believed the appellant to be expressing his own fears and not making a threat.

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[8]This is the standard of materiality that applies when the defense has made, as in this case, a general request for *Brady* material. *See Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

[9]The relevant part of co-conspirator Brown's statement reads as follows:

> Q. Okay. You said, Dave, that boat's got to be on the trailer?
> A. Yes, sir.
>
> Q. And what did he say?
> A. He didn't want to do it. He didn't want to, but I told him that I didn't have any choice and that they'd threatened my family and threatened me, and they knew who I was, And I – I guess I kind of begged him.
>
> Q. Okay.
> A. And I – at the time, I guess, truthfully, our biggest concern was trying to preserve the marina because he, you know, he was really concerned about that.
>
> Q. Dave was?
> A. Yes, sir.
>
> Q. Did he say anything – what else did he say, now?
> A. These people wanted their stuff, you know. And he said he didn't want to be involved.
> And I said, you know, that I didn't have any choice and that's really all we discussed.
>
> Q. What else did he say?
> A. He just said that I could use that truck, and he said not to get caught with it.

Brief of Appellant Parks, at 35. This evidence did exactly what the appellant claims the statement of co-conspirator Brown would have done; it rebutted the government's argument that the appellant was attempting to protect himself by threatening a government witness, and tended to show that the appellant was merely expressing a well-founded fear on his part to the witness. Consequently, *Brady* provides no relief for the appellant since the introduction of co-conspirator Brown's statement would have been cumulative at best. The overwhelming evidence of guilt in this case belies any notion that the discovery material might have created a reasonable doubt. *See Agurs.* We concluded that appellant Parks suffered no deprivation of his right to a fair trial because of the belated discovery of his co-conspirator's statement.

[5] Appellant Parks also contends that the district court erred when it failed to strike the testimony of a government chemist; he argues that the testimony should have been stricken as a discovery sanction against the government for its failure to provide the defense with a copy of a relevant lab report prior to trial. Fed.R.Crim.P. 16(d)(2) makes it clear that the choice of remedy for a violation of discovery requirements is committed to the sound discretion of the trial court:

> If . . . it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

"To support a claim for reversal of the exercise of that discretion, the accused must show prejudice to substantial

rights." *United States v. Kidding,* 560 F.2d 1303, 1313 (5th Cir.1977). The appellant has made no such showing here. The appellant simply asserts that the government's untimely disclosure of the lab report denied him his right to effectively challenge the report or pursue further discovery concerning the evidence or the government witness. *Brief of Appellant Parks,* at 24. We note, however, that the only step taken by the defense to relieve itself from the predicament it now complains of, was its request that the chemist's testimony be stricken from the record. The defense never asked for a recess, let alone a continuance, to give it an opportunity to review the report. No request had been made for inspection or testing of the seized contraband. There had been no issue concerning identity of the substance. The defense simply acquiesced in the continuation of the trial. *See United States v. James,* 495 F.2d 434, 436-37 (5th Cir.1974); *see also United States v. Avila,* 443 F.2d 792, 795 (5th Cir.1971). To put it simply, the prejudice now complained of by the appellant "could perfectly well have been rectified by a recess. Absent such a request the court cannot be faulted for having denied the request to preclude the [g]overnment from alluding to the [report] in question." *United States v. Pineros,* 532 F.2d 868, 872 (2nd Cir.1976). Although we don't condone the government's actions, we hold that in the particular circumstances of this case, the government's failure to comply well have been rectified by a recess. Absent such a reamount to reversible error.

[6] Appellant Parks' remaining claims have less merit. The appellant contends that the sample of marijuana taken by a government witness from one of the boats used in the criminal activity was improperly admitted into evidence over objection. He claims the government failed to introduce evidence connecting the marijuana to him. "It

is clear that connection of physical evidence with a defendant may be shown by circumstantial evidence." *United States v. Soto,* 591 F.2d 1091, 1099 (5th Cir.1979); *United States v. White,* 569 F.2d 263, 266 (5th Cir.1978). Further, we have consistently held that "proof of the connection goes to the weight of the physical evidence rather than its admissibility." *Soto,* at 1091-92; *United States v. Stewart,* 579 F.2d 356, 359 (5th Cir.1978); *United States v. Hughes,* 658 F.2d 317, 320 (5th Cir., Unit B 1981); *United States v. Poe,* 462 F.2d 195 (5th Cir.1972). Stires testified the marijuana he gave to the government came from the 262 Chris Craft. Other witnesses testified as to the chain of custody from that point forward. The questions concerning how and where the substance was kept by Stires were proper for the jury as was the credibility of all the witnesses. Appellant Parks' insistence that the government's failure to establish a chain of custody of the marijuana sample prevents the admission of such evidence is equally meritless, "as evidence regarding a chain of custody does not affect admissibility, only the weight of the evidence." *United States v. Morgan,* 559 F.2d 397, 399 (5th Cir. 1979); *United States v. Hughes,* at 320; *United States v. Colatriano,* 624 F.2d 686 (5th Cir.1980); *United States v. Henderson,* 588 F.2d 157 (5th Cir.), *cert. denied,* 440 U.S. 975, 99 S.Ct. 1544, 59 L.Ed.2d 794 (1979).

We affirm the conviction of appellant Parks.

CONCLUSION

We have examined thoroughly all of the appellants' contentions raised on appeal, including those not worthy of discussion, and find them to be without merit. The appellants' convictions are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6007

D.C. Docket No. 81-39-ORI-CR-R

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

TERRENCE A. KUBIAK, DAVID PARKS,
THEODORE BURTON, IV.
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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Before FAY and VANCE, Circuit Judges, and ALLGOOD*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

May 20, 1983

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*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

ISSUED AS MANDATE: JUL 13 1983 (AS TO APPELLANTS TERRENCE A. KUBIAK AND THEODORE BURTON IV, ONLY)

APPENDIX C

Title 18, United States Code

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the con-

trary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment of information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall com-

mence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to –

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from

places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained

by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7)(A) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its

reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of

counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo cotendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly –

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to

demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the

time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

APPENDIX D

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

APPENDIX E

SPEEDY TRIAL ACT
P.L. 96-43
SPEEDY TRIAL ACT AMENDMENTS ACT OF 1979

P.L. 96-43, see page 93 Stat. 327.

Senate Report (Judiciary Committee) No. 96-212, June 13, 1979 [To accompany S. 961]

House Report (Judiciary Committee) No. 96-390, July 26, 1979 [To accompany S. 961]

Cong. Record Vol. 125 (1979)

DATES OF CONSIDERATION AND PASSAGE

Senate June 19, July 31, 1979

House July 31, 1979

The House Report is set out.

HOUSE REPORT NO. 96-390

[page 1]

The Committee on the Judiciary, to whom was referred the bill (S. 961) to amend the Speedy Trial Act of 1974, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

• • • • • • •

PURPOSE

The bill reported by the committee, (S. 961) with an amendment in the nature of a substitute, was passed by the Senate on June 19, 1979, and sent to the House. The purpose of the bill, as hereby reported, is to amend title I of the Speedy Trial Act of 1974 (18 U.S.C. 3161-3174) in the following manner:

1. By suspending, until July 1, 1980, the sanction of dismissal for failure to meet the time limits of section 3161(b) and (c). Provision is made for earlier reinstitution of the dismissal sanction in districts prepared to do so;

2. Merging the 10-day indictment-to-arraignment and the 60-day arraignment-to-trial time limits contained in section 3161(c) into a single 70-day indictment-to-trial period;

3. Requiring, in the absence of a waiver by the defendant, a minimum of 30 days time between the defendant's first appearance with counsel and trial;

4. Requiring that, if a defendant is to be tried on an indictment or information dismissed by a trial judge and reinstated on appeal, trial shall commence within 70 days, with provision for extension of this time limit to 180 days if trial within 70 days is impractical;

5. By clarifying certain periods of exclusion from the time limits of section 3161 (b) and (c), and clarifying provisions relating to authority for courts to order continuances when required to meet "the ends of justice";

6. In the case of persons in custody or designated as "high risk" defendants, making permanent the interim limit of 90 days from commencement of custody or designation as a high risk defendant to beginning of trial, with provision for release from custody or review of the high risk designation if this limit is exceeded;

7. By requiring all districts except those which elect to reimpose the dismissal sanction prior to July 1, 1980 to file on additional speedy trial plan; provisions of section 3166 relating to the contents of such plans are amended to re-

quire inclusion of certain information relating to the civil docket in the district, and by permitting inclusion of circuit council guidelines to be used in the implementation of the act;

8. By amending section 3167, relating to reports to Congress, to require additional information to be included in the next report to the Congress to be submitted by the Administrative Office of U.S. Courts, and by requiring a one-time report by the Department of Justice, to be submitted to the Congress not later than December 31, 1979, detailing the experience of the U.S. Attorneys in implementing the act;

9. Amending section 3168 to require that the membership of each district planning group include an attorney in private practice with substantial expeience in civil litigation;

10. By making the data collection requirements of section 3170 permanent;

11. By amending the provisions of section 3174, relating to extension of time limits due to judicial emergency, to provide for final approval of such extensions by the circuit councils, and by modifying the provisions for the granting of additional extensions of time limits beyond the initial extension; and

12. By authorizing the chief judge of each district to suspend the time limits of section 3161 for a period of thirty days, when the need for such a suspension is found by the chief judge to be of great urgency.

BACKGROUND OF THE SPEEDY TRIAL ACT

The Speedy Trial Act of 1974 was enacted following, and at least partially in response to the decision of the Supreme Court in *Barker* v. *Wingo*, 4707 U.S. 514 (1972)[1] in which the Court expressed reluctance to "engage in legislative or rulemaking activity" by declining to hold "that the speedy trial right can be quantified into a specified number of days or months." *Id.* 523. A year earlier, in *U.S.* v. *Marion*, 404 U.S. 307,[2] the Court had held that the speedy trial provisions of the Sixth Amendment do not apply to pre-indictment delays.

Further evidence of the need for the Speedy Trial Act of 1974 came from a variety of sources, including the apparent weakness of Rule 50(b) of the Federal Rules of Criminal Procedure (the court-prescribed rule for the establishment of speedy trial guidelines in each judicial district), the favorable experience of the Second Circuit under restrictive time-to-trial guidelines of their own, studies which indicated that defendants held for trial longer than 60 days were much more likely to commit additional crimes while on bail, and the ABA's 1968 Standards Relating to Speedy Trial. In response to this need, Congress enacted a statute which, for the first time, both gave effect to a Federal defendant's right to speedy trial under the Sixth Amendment and acknowledged the danger to society represented by accused persons on bail for prolonged periods of time.

The act provides that, after July 1, 1979, accused persons must be indicted within 30 days of arrest, arraigned

[1] 92 S.Ct. 2102, 33 L.Ed.2d 101.
[2] 92 S.Ct. 455, 30 L.Ed.2d 468.

within 10 days of indictment, and tried within 60 days of arraignment. Failure to meet the time line of 30 days from arrest to indictment calls for a dismissal of the charges; the statute makes no mention of a requirement that the defendant move for such a dismissal, but, as a practical matter, such a motion will be necessary to bring the matter to the attention of the court in the pre-indictment phase of the proceedings. Failure to meet the 60-day arraignment to trial requirement calls for dismissal of the charges on the motion of the defendant. The statute is silent on the subject of dismissal for failure to meet the 10-day indictment to arraignment requirement, and no sanction provided. Numerous flexible exclusions of time provided for in the act can be taken into account to extend these time limits, and the act provides broad authority for courts to grant continuances which are found to be "in the ends of justice." The court may, in its discretion, grant the dismissal either with or without prejudice, stating in writing its reasons therefor, after taking into account the seriousness of the offense, the facts and circumstances leading to dismissal and the impact of reprosecution on the act and the administration of justice. If the dismissal is without prejudice, the Government can recharge the defendant; the act provides for a period of from 60 to 180 days for retrial. In addition, the court may impose sanctions in the form of fines, reduced compensation and/or denial of the right to practice before the court, against prosecution and defense counsel who knowingly delay a case without justification.

Final implementation is the culmination of a 4-year phase-in process, for which the act made very detailed provision. Each district was to convene a speedy trial planning group by August 30, 1975, for the purpose of drafting and

filing implementation plans for each of the phase-in years. These periods were as follows:

September 29, 1975. – Implementation of plan for trial of detainees and "high risk" defendants within 90 days of arrest, to remain in effect. (Section 3164)

June 30, 1976. – Submission of plans for trial of cases during July 1, 1977-June 30, 1979.

July 1, 1976-June 30, 1977. – First phase-in year of time limits: 60 days, arrest-indictment; 10 days, indictment-arraignment; 180 days arraignment-trial (60/10/180); no sanctions for failure to meet.

July 1, 1978-June 30, 1979. – Third, and final phase-in year: 35/10/80; no sanction.

July 1, 1979. – Final plans, time limits (30/10/60) and sanctions take effect.

LEGISLATIVE HISTORY
P.L. 96-43

[page 4]

The Director of the Administration Office of the U.S. Courts was required to submit detailed implementation reports to the Congress on September 30, 1976-77-78. Each planning group was required to consider all relevant factors which might affect phase-in and final implementation of the act. Clerks in each district were required to collect and assemble all required information and disseminate it to appropriate parties (section 3170). The reports of the planning groups and the Director were required to specify the "rule changes, statutory amendments, and appropriations needed" to help implement the act and "further im-

prove • • • the administration of justice in (each) district" (sections 3166(f), 3167(b)).

Finally, the act specifies that it does not derogate any Sixth Amendment rights (i.e., right to representation by competent counsel) (section 3173) and it provides for declarations of "judicial emergency," whereby district court chief judges can apply to the circuit council for a suspension of the time limits. If the Judicial conference approves the circuit's application, time from arraignment to trial can be enlarged up to 180 days for cases for which indictments are filed during that period. The time limits can be suspended up to one year. Sanctions for failure to meet the time limits for detained defendants may not be suspended. (Section 3174)